UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Michael E. Lopez,
(Petitioner)

and

Lamons Gasket Company,
a Division of Trimas Corporation, Case No. 16-RD-1597
(Employer)
and

United Steel, Paper and Forestry
et al. Union (USW),
(Union)

REPLY BRIEF OF PETITIONER MICHAEL LOPEZ

Petitioner Michael Lopez hereby replies to the brief of the United Steel, Paper and Forestry et al. Union (USW) and the amicus briefs that support overruling Dana Corp., 351 NLRB 434 (2007), filed by the AFL-CIO, SEIU and UFCW.

POINT 1: **Secret Ballots are Superior.** How does one respond to the argument that a "card check" (a.k.a. "voting" in public, where partisan union organizers stand over the "voter" and know precisely how he or she "votes") is a "**superior** method" of gauging employees' support for union representation than is a secret-ballot election? (UFCW Brief at 4-10, emphasis added; SEIU Brief at 19-24). How does one respond to the argument that Congress, the Supreme Court and the Board are singularly and collectively wrong, and that

their 70-year preference for secret-ballot elections is a "stale bromide"? (UFCW Brief at 6).[1] How does one respond to the argument that employer unfair labor practices should be remedied not by sanctioning the miscreant employer, but by banning secret-ballot elections for employees? (UFCW Brief at 6-10).[2]

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[1] **Congress** enacted Sections 7 and 9 of the NLRA in recognition of employees' equal right to join a union or refrain, and their equal right to vote for or against union representation. The **Supreme Court** has long recognized that secret-ballot elections – the gold standard – are preferred by federal labor law over card checks. NLRB v. Gissel Packing Co., 395 U.S. 575, 602 (1969) ("secret elections are generally the most satisfactory–indeed the preferred–method of ascertaining whether a union has majority support"); Brooks v. NLRB, 348 U.S. 96 (1954) ("an election is a solemn and costly occasion, conducted under safeguards to voluntary choice"). The **Board** has also long recognized that federal labor law prefers secret-ballot elections over card checks. Levitz Furniture Co., 333 NLRB 717 (2001) (an employer's unilateral determination as to employee support or opposition to union representation is disfavored); Underground Serv. Alert, 315 NLRB 958, 960-61 (1994) (same). Not surprisingly, **union members** also favor secret-ballot elections! Polling data shows that "a majority of union members polled would prefer secret-ballot elections over card-check recognition." New Survey Says Union Members Prefer Secret-Ballot Elections Over Card Check, Daily Lab. Rep., July 22, 2004.

[2] The UFCW's argument to ban secret-ballot elections because of an alleged "epidemic of unlawful employer activity during Board elections" (UFCW Brief at 7) finds its basis not in the Board's statistics, but in the writings of a tiny cadre of academicians notorious for their biases in favor of institutional union power and privileges. (UFCW Brief at 5-10). Beauty is obviously in the eye of the beholder, because some would call these academicians "scholars" while others would dismiss them as "partisan" polemicists engaging in "academic speculation." Rite Aid/ Lamons Gasket, 355 NLRB No. 157 (2010) at *1-2 (Chairman Liebman, concurring). But for every such article cited in the union briefs, other scholarly articles can be cited for the opposite propositions. See, e.g., Richard Epstein, One Bridge Too Far: Why the Employee Free Choice Act Has, and Should Fail, U. Chic. Sch. of Law (Aug. 2010), accessible at http://www.law.uchicago.edu/files/file/528-rae-free-choice.pdf; Big Labor-Funded Study Deeply Flawed, accessible at http://www.nilrr.org/node/17; James Sherk, Organized Labor Concedes: Employer Violations Rare in Secret Ballot Elections, Heritage Society (June 15, 2009), http://www.heritage.org/research/reports/2009/06/organized-labor-concedes-employer-violations-rare-in-secret-ballot-elections; Privatizing Labor Law: Neutrality/Card Check Agreements and the Role of the Arbitrator, 83 Ind. L.J. 1589 (2008); Raymond J. LaJeunesse, Jr., The Controversial "Card-check" Bill, Stalled in the United States Congress, Presents Serious Legal and Policy Issues, 14 Tex. Rev. L. & Pol. 209 (2010).

One can only respond to these arguments with the derision and ridicule they deserve! This is the United States of America, where citizens instinctively know that true democracy only occurs where there is secret-ballot voting. At the risk of (slight) hyperbole, the unions' prescription for banning secret-ballot elections (whether because of perceived employer ULPs or any other reason) finds parallels in the rule of Saddam Hussein, who regularly "won" his non-secret-ballot elections with 98.9% of the vote. The other 1.1% of voters were never heard from again.

United States Representative George Miller (Chairman, House Committee on Education and Labor) instinctively knows this too, which is why he and fifteen other U.S. congressmen authored a letter to Mexican government officials demanding use of the secret ballot for unionization elections in Mexico. "[W]e feel that the secret ballot election is absolutely necessary in order to ensure that workers are not intimidated into voting for a union they might not otherwise choose." Letter from Rep. Miller et alia to Junta Local De Conciliation y Arbitraje del Estado de Puebla, Aug. 28, 2001. Former Senator George McGovern knows this too. George S. McGovern, "The 'Free Choice' Act Is Anything But," Wall St. J., May 7, 2009, at A15.

In short, the argument that secret-ballot elections are inferior to card checks in terms of assuring worker freedom of choice is absurd and delusional.

POINT 2: **The NLRA Protects Free Choice.** All of the unions (USW, UFCW, SEIU, AFL-CIO) fail to recognize (or even mention) the fundamental point of federal labor law: protection of employees' right to choose or reject unionization. The unions' briefs

completely and totally ignore Section 7's equal right to refrain. This blatant omission of the importance of employees' Section 7 rights is more than a "Freudian slip." Simply stated, the USW and its amicus know well that they cannot defend the pre-Dana "voluntary recognition bar" and simultaneously defend employees' Section 7 right to freely join a union or freely refrain from doing so, since they are inherently incompatible. This is especially true under the facts of this case, where the USW and Lamons Gasket negotiated a secret agreement that pre-ordained USW representation of the employees, without a secret-ballot vote. (Stipulation, Jt. Ex. 5, granting the USW exclusive access and other privileges granted to no other unions).

SEIU claims that employees who sign authorization cards are not fooled and know that they are waiving any chance for a secret-ballot election, since "unions have tended to publicly and explicitly state their intention to obtain voluntary recognition through authorization cards." (SEIU Brief at 17). This argument, that employees know the legal implications of signing an authorization card because unions act in a public and "above-board" manner when soliciting cards, is laughable. Here, the facts (as opposed to SEIU speculation) demonstrate that the USW and Lamons Gasket are parties to a secret neutrality and card check agreement, and there is not one iota of evidence to show that employees were notified of this secret arrangement or the legal implications of signing an authorization card when they were approached to sign. Moreover, it is a fact (as opposed to speculation) that SEIU frequently enters into secret neutrality and card check agreements and refuses to share them with the targeted employees. Rescare & SEIU Local District 1199, Case Nos. 11-CA-21422 and 11-CB-3727 (NLRB Advice Memorandum, Nov. 30, 2007), accessible at

http://www.nlrb.gov/shared_files/Advice%20Memos/2007/11-CA-21422.pdf.

Instead of expressing even an iota of concern for employees' Section 7 right to knowingly choose or reject a union, the unions' briefs exalt "stability" (for unions) as the paramount purpose of the NLRA. Sadly, what these unions really mean by "industrial peace and stability" is preserving their ability to excise the NLRB from the representational process and cut secret backroom "pre-recognition" deals that satisfy the self-interests of unions and employers, at the expense of employees' interests. But the Board must remember that "unions exist at the pleasure of the employees they represent. Unions represent employees; employees do not exist to ensure the survival or success of unions." MGM Grand Hotel, Inc., 329 NLRB 464, 475 (1999) (Member Brame, dissenting).

Indeed, despite decades of Supreme Court case law guaranteeing employees equal rights under Sections 7 and 9 of the Act to vote for a desired union or to vote out an unwanted union, such rights are simply off the radar screens of the unions filing briefs in this case. The unions refuse to cite cases like Pattern Makers League v. NLRB, 473 U.S. 95, 104-07 (1985) (policy of the NLRA is "voluntary unionism"), Lechmere, Inc. v. NLRB, 502 U.S. 527, 532 (1992) ("By its plain terms . . . the NLRA confers rights only on *employees*, not on unions or their nonemployee organizers."), and Chamber of Commerce v. Brown, 554 U.S. 60, ___, 128 S. Ct. 2408, 2414 (2009) ("§ 7 calls attention to the right of employees to refuse to join unions" and their right to receive information in opposition to unions).

The unions also ignore bedrock principles of federal labor law, such as this one from NLRB v. Savair Mfg. Co., 414 U.S. 270, 278 (1973):

> Any procedure requiring a "fair" election must honor the right of those who oppose a union as well as those who favor it. The Act is wholly neutral when it comes to that basic choice. By § 7 of the Act employees have the right not only to "form, join, or assist" unions but also the right "to refrain from any or all of such activities."

In short, the Board should ask itself why all of these unions exalt "industrial stability" but are singularly and collectively cavalier about the main touchstone of the NLRA, employees' Section 7 rights.

POINT 3: **Dana has not hampered voluntary recognition.** SEIU argues that "Dana has encouraged mischief by employers" by giving them "additional opportunities to interfere with the rights of its employees to freely choose whether to be represented by a union." (SEIU Brief at 10). This unsupported proposition is also laughable, since the 1,000 employers accepting card checks and granting voluntary recognition since Dana Corp. have already acceded to the union and waived their own rights to a secret-ballot election. Linden Lumber Div., Summer & Co. v. NLRB, 419 U.S. 301 (1974) (employers have the absolute right to reject a card check and to require the union to file for a Board election). Thus, the idea that the 1,000 employers who granted voluntary recognition since Dana Corp. then immediately turned around and committed "mischief" to spark decertifications (when they could easily have demanded a Board-supervised election in the first instance) is frivolous. While Petitioner Lopez understands that the unions hold employers in deep contempt, he does not believe that employers are so Machiavellian as to waive secret-ballot elections in the first instance just to foment them days later.

POINT 4: **The unions provide no "empirical evidence."** All of the unions (USW, UFCW, SEIU, AFL-CIO) fail in the basic task handed to them by the Board: to provide

"empirical evidence" about how Dana works in real life. Rite Aid/Lamons Gasket, 355 NLRB No. 157 (2010). Indeed, no such studies or evidence exists, since three years is too short of a time frame to develop such evidence. Instead, the unions provide a few carefully culled examples of "horror stories," but Petitioner notes that the briefs filed with the Board contain no sworn declarations or affidavits from union officials about any of these tales. Typical of the gross generalizations and unsupported speculation is the SEIU's Brief at 11, where the union discusses, without evidence or citations, what "may" motivate employers in card check situations. Similarly, SEIU mentions "our experience in a number of cases" where employers allegedly fomented Dana decertifications, but the union never specifies whether the "number of cases" is one, two or fifty-two, nor does it provide citations, evidence, witness statements, or sworn affidavits. Speculation and gross over-generalizations do not constitute "empirical evidence."

In contrast, empirical evidence is provided by the National Right to Work Legal Foundation's (NRTW) amicus brief, where many employees attest in sworn declarations to the harassing and coercive treatment they received during union card check campaigns. The Board is asked to particularly note the sworn testimony of Larry Getts, which is attached to the NRTW brief. Mr. Getts is the victorious Dana decertification petitioner in Dana Corp and UAW, Case No. 25-RD-1511 (25-VR-01). If the Board wants empirical eyewitness testimony of how a card check campaign works in real life, it should carefully review his sworn submission and not rampant speculation by self-interested entities.

POINT 5: **The USW's data is carefully skewed**. Darrell Huff's book, "How to Lie

with Statistics" (W.W. Norton & Co., Oct. 17, 1993) is a classic text on the use and misuse of statistics. The USW must have read it before reciting the details of its eleven voluntary recognitions since Dana Corp. was decided in 2007. (USW Brief at 2-5). The union decries that fact that four of these eleven recognitions ("over 36% of the cases") yielded an employee petition for decertification, in which only one such election was successful. According to the USW, this process is wasteful and duplicative, since it won three of those four elections.

But these same statistics can be viewed in a very different way. For example, it is also true that in the USW's four Dana decertification election cases, the union lost an astounding 25% of the post-card check secret-ballot elections. This 25% "failure rate" proves that the USW's card checks are erroneous in demonstrating that the union ever enjoys the support of a majority of employees. Shouldn't the Board take cognizance of, and try to remedy, a 25% failure rate among USW card check recognitions?

Alternatively, Petitioner Lopez notes with alarm that one of eleven USW voluntary recognitions (or close to 10%) have been proven to be suspect if not totally erroneous. Isn't a 10% failure rate for all USW card checks enough to warrant continuing Dana Corp. as a safety valve for employees who may be saddled with a union that their employer chose for them? Patterson v. Heartland Indus. Partners, 428 F. Supp. 2d 714, 718 (N.D. Ohio 2006) ("Heartland [the employer] . . . has apparently selected and contracted with a union of Heartland's choice").

The bottom line is that statistics can be manipulated for many purposes, and a federal labor board seeking "empirical evidence" should not be swayed by clever uses of raw

numbers and anecdotal tales that are unsupported by citations or sworn declarations.

POINT 6: **The Dana notices are fair to employees**. The USW and other unions declare that the language of the Dana notices is one-sided and claim that the notices serve to foment decertification efforts. (USW Brief at 14-15; AFL-CIO Brief at 3-4). But in making this argument, the unions speak out of both sides of their mouths.

On the one hand, they argue that Dana Corp. is worthless because only 1.4% of voluntary recognitions have been overturned since the case was decided. (SEIU Brief at 2-4; USW Brief at 17-18). On the other hand, they argue that Dana Corp.'s mandatory notice provisions are causing a massive problem by "fomenting" decertifications and destroying the utility of card check recognition.

These arguments are self-contradictory, especially when viewed against the fact that over 1,000 voluntary recognitions have gone into effect unmolested by Dana Corp.'s allegedly "one-sided" notice, as compared to 85 times when elections have actually been sought. The Dana notice has served to "foment" nothing but employees' knowledge of their rights.

As Petitioner pointed out in his original brief, Dana Corp. is working precisely as intended by allowing the majority of voluntary recognitions to go into effect without fanfare, while giving employees a safety valve in the most egregious situations where the unions or employers may have abused their power. The example of Larry Getts, the victorious Dana decertification petitioner in Dana Corp. and UAW, Case No. 25-RD-1511 (25-VR-01) is instructive. (See NRTW Amicus Brief). Mr. Getts and his co-workers overcame both union

and employer pressure to win their decertification election. Union arguments that this "safety valve" has destabilized labor relations and wrecked the NLRA ring hollow.

POINT 7: The USW's facts are skewed. The USW tells a one-sided anecdotal tale about the facts of this very case. (USW Brief at 19-21). The USW argues that Lamons Gasket committed all sorts of unfair labor practices and deviously undermined the union's status, despite: 1) its secret agreement to assist the union's organizing efforts (Stipulation, Jt. Ex. 5); 2) its grant of voluntary recognition based upon a card check; and 3) its signing a collective bargaining agreement after only eight months of bargaining. However, Petitioner Lopez states categorically that he got no support or assistance of any kind from Lamons Gasket, and that his decertification effort was completely and totally an employee-driven effort. The real reason for the delay in moving the decertification effort forward was the union's petty "blocking charges" that allowed it to "game the system," and its crafty use of the Board's often-abused "blocking charge" rules to stymie a legitimate decertification effort.

Conclusion: The Request for Review should be denied on the merits, and the Regional Director should be ordered to count the ballots in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2010, I caused a copy of the foregoing Reply Brief to be filed electronically with the National Labor Relations Board's Office of the Executive Secretary through the NLRB's e-filing program. Additionally, I further certify that on November 12, 2010, I served a true and correct copy of this document by e-mail on the following parties:

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